SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 885

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM V. MASSEI,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the facts in the case at bar are so different from the facts in *U. S.* v. *Ford*, 237 F.2d 57 and in *U. S.* v. *Adonis*, 221 F.2d 717 as to eliminate any conflict in the decisions. Court below so held. (Petition App. p. 33)

2. Whether the Court below misapplied this Court's decisions in *Smith* v. *U. S.*, 348 U.S. 147 and *U. S.* v. *Calderon*, 348 U.S. 160 as to corroboration of respondent's admissions.

3. Whether the Court below's ruling on the irrelevancy of the respondent's admissions conflicted the decision in *U. S.* v. *Ford*, 237 F.2d 57 on this point.

4. Whether the presence of other meritorious arguments show the decision below to be correct without regard to the question sought to be raised by the Petition and as a result this Court cannot reach the point of alleged conflict.

Statement of the Case

Respondent was indicted and convicted by a jury of tax evasion for the years 1946 through 1950. The Government's case was based on the net worth method of proof.

Respondent joined the Worcester Police Force as a patrolman in 1923 (R. 200). From *April 20, 1932 to March 1, 1933*, he was assigned as a plainclothes officer to the vice squad (R. 204, 205). He was again on the vice squad from *January 10, 1938 to September 11, 1939*. As a sergeant on *January 6, 1940* he was the head of the vice squad which continued *until June 1, 1943* (R. 205, 206). Thereafter, until his retirement on December 30, 1951, respondent had no connection with the vice squad. His duties were personnel officer wherein he inspected the physical plant and saw that the uniformed patrolmen carried out their assignments. He was also assigned to the license board where he investigated licenses for hackneys, gas stations and parking lots. He had nothing to do with taverns, liquor stores or liquor interests (Defendant's Exhibit B, R. 206). Respondent's salary for the years 1946, 1947, 1948, 1949 and 1950 was $2850.00, $3300.00, $3300.00, $4080.00 and $4080.00, respectively (R. 223, 224).

The evidence showed the following increases in respondent's net worth: 1946—$27,265.38; 1947—$9,991.64; 1948—$5,533.22; 1949—$9599.72; and 1950—$36,033.31 (Govern-

ment's Exhibit 44, R. 775). On these increases additional taxes were allegedly owing as set forth in Government's Exhibit 45 (R. 777).

Respondent according to the Government had a net worth on December 31, 1945 of $61,080.73. He was given no credit for any cash or currency on hand (Government's Exhibit 44, R. 775).

No tax was paid from 1921 through 1939 (R. 115, 116) but as a municipal employee his salary was exempt, this was in addition to the general $2000.00 exemption in those years (R. 119). Living expenses of respondent in 1946 as fixed by the Government were $1313.40. (Government's Exhibit 44, R. 775).

In its answer to the respondent's bill of particulars the Government specified that the source of the alleged income for each of the years in question was illegal payments to respondent as a police officer by many persons engaged in illegal activities (R. 12, 13).

No evidence of this was introduced.

To satisfy its burden of proof of a likely source of currently taxable income to which the increases in net worth could be attributed, the Government instead introduced the following evidence.

One conversation according to the testimony of the investigating agents, occurred in the presence of the defendant. On November 27, 1941, Garrity, attorney for the taxpayer, arranged for the opening by the respondent of a safe deposit box which he had maintained in a bank in Westerly, Rhode Island, so that the agents might examine its contents. It was the only time the agents had any conversation with the respondent (R. 553). While Hurst was dictating an inventory of the papers in the box to Agent Calatrello, who was the Revenue Agent assigned to the investigation, Hurst turned to the respondent and asked him where all the money came from with reference to his

net worth; the respondent answered, "from a number of different people at different times many years ago", whereupon Garrity interrupted and stated that the respondent got the funds during prohibition days from letting liquor trucks roll through Worcester; the respondent then picked up the conversation and said he got the funds in the nature of a gift and didn't think they were taxable (R. 436-7, 600).

This testimony was admitted into evidence over the strenuous objection of the respondent on the grounds that (a) it was outside the scope of the bill of particulars filed by the Government; (b) it was irrelevant; (c) it was immaterial, and at the conclusion of the testimony, respondent advanced the additional ground that (d) the statements were wholly uncorroborated by other evidence.

On three other occasions in the absence of the respondent, according to prosecution witnesses, Garrity told them that the money spent by the respondent from 1946 to 1950 came from graft taken by him during prohibition days and while he was on the vice squad between 1933 and 1943. The occasions were as follows: (a) On an unspecified date in November or December, 1951, to Hurst in his office (R. 486); (b) on January 24, 1952, to Hurst in his office (R. 461, 471); and (c) on May 20, 1952, to Hurst and Attorney Isber of the Treasury's District Counsel's office in Mr. Isber's office at a conference at which Garrity was endeavoring to persuade Attorney Isber to recommend against criminal prosecution of the respondent (R. 484-487, 579-581).

The respondent objected to the admissibility of these statements of the attorney on several grounds: (a) The attorney's statements were not made as statements of fact but hypothetically in the course of arguing the innocence of his client; (b) that the respondent never authorized the attorney to make the statements in question; (c) that their admission in evidence would violate the attorney-client privilege which the respondent had never waived; (d) that

they were outside the scope of the bill of particulars filed by the Government; (e) that they were irrelevant; (f) that they were immaterial, inflammatory and highly prejudicial to the respondent. At the conclusion of the evidence, upon moving to strike the testimony, the respondent advanced the additional ground (g) that the statements were wholly uncorroborated by other evidence.

Government witnesses also testified that during the conference of May 20, 1952 with Isber, respondent's attorney stated that in February 1949 the respondent obtained "X dollars, after the death of his father, who had saved a lot of cash" from a partnership interest in a tavern which was engaged in the illegal sales of liquor (R. 491, 581). F. Joseph Donohue, Register of Probate for Worcester County, testified that the petition for probate of the will and the will itself of Pilade Massei, respondent's father, had been duly filed and allowed but no inventory or account had ever been filed. John Bianchi, executor of the will, testified that he had filed no inventory and that the only asset of the estate which he could find was a three tenement house in Worcester. It was established that the respondent in 1949 had received only a one-half interest in the three tenement house from his father's estate. As to this evidence, the Government's petition for certiorari is inaccurate, at page 4, in stating that the defendant, except for the one-half interest in the house, "did not receive any gifts or inheritances at any time." There was no evidence as to whether the defendant did or did not receive gifts or inheritances before 1946.

As to this evidence, the Court below held that it was inadmissible on the grounds that the admissions were not corroborated, and were irrelevant and immaterial (Government Petition, App. 23, 27). Since there was no other evidence of likely source, the Court below ruled that re-

spondent's motion for a verdict of acquittal should have been granted.

In addition respondent urged on the Court below several other errors which would justify reversal and which the Court below did not touch on. Demands of brevity will not permit any more than a brief recitation of these errors with appropriate reference to the Record or Respondent's brief below. These errors are as follows:

1. The Court erred in refusing to allow appellant to be heard and offer evidence in support of his Motions to Dismiss the indictment because of improper presentation of improper evidence to the Grand Jury and to inspect the Grand Jury minutes. (Appellant's brief, pp. 19-21).

2. The appellant was denied a speedy trial. (Appellant's brief, pp. 21-25)

3. Alleged admissions of respondent's attorney were privileged and unauthorized. (Appellant's brief, pp. 25-28)

4. The Court should have decided the question as to the attorney's authority and erred in submitting it to the Jury. (Appellant's brief, pp. 28-29)

5. The Court erroneously excluded testimony offered by the appellant to prove that his attorney's alleged admissions were rhetorical and not factual. (Appellant's brief, pp. 29-31)

6. The Court's charge to the Jury misstated the law in many vital particulars as to the net worth method of proving tax evasion and the admissibility of the attorney's alleged admissions. (Appellant's brief, pp. 36-41)

7. A fixed starting point was not established. (Appellant's brief, p. 43)

Reasons for Denying the Writ

I. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT IN ANY WAY WITH THE DECISION IN *U. S.* v. *Ford* (2nd Circuit), 237 F.2d 57 AND THE DECISION IN *U. S.* v. *Adonis* (3rd Circuit), 221 F.2d 717.

In *Holland* v. *U. S.*, 348 U.S. 121, 137-138, this Court held that there must be some independent showing of a likely source of income to account for the increases in net worth. Under the cases this "likely" source may be proved in one of two ways.

(a) By showing that the taxpayer is in an income-producing business from which the income could have been derived. *Holland* v. *U. S.*, 348 U.S. 121 (hotel business proven to be capable of producing much more income than was reported); *U. S.* v. *Johnson*, 319 U.S. 503 (concealed ownership of taxpayer of gambling houses).

(b) By evidence of specific items of unreported income. In *U. S.* v. *Chapman*, 168 F.2d 997, the Government showed a possible source of income by testimony that during the prosecution period seven meat peddlers paid overceiling prices for purchases from the defendant's company, paying the excess in currency either to Chapman direct or to his salesmen. In *U. S.* v. *Skidmore*, 123 F.2d 604, there was evidence that bookies paid monthly sums to the defendant in currency for "profection".

In the *Ford* and *Adonis* cases, the Courts have carved two exceptions to the rule requiring the Government to prove a likely source. First of all, both cases are clearly distinguishable on the facts from the case at bar. In the *Ford* case, the Government introduced no direct evidence

that the defendant had ever received a bribe. Plentiful evidence, however, was introduced which disclosed that during the prosecution years the defendant had "opportunities" for graft *flowing from his position in charge of the investigation for vice.* In the case at bar, the Government introduced no evidence bearing on the prosecution years, no evidence of "opportunities" for graft, and most significant the respondent was not on the vice squad after 1943 but performed administrative duties on the police force.

In the *Adonis* case, the facts also are clearly distinguishable. Adonis had been indicted for tax evasion for the year 1948. The Government proceeded on the net worth theory. In 1951, Adonis testified in a judicial proceeding in Holland and was questioned as to the increase in his net worth in the year '48. In this judicial proceeding, Adonis offered five different sources which together made up the total increase in net worth. At the tax evasion trial, the Government offered in evidence Adonis' testimony in this Holland judicial proceeding and then proceeded to prove that his explanations as to source were fabrications. The Court of Appeals ruled that this calculated fabrication was sufficient evidence from which the jury could infer that the source of his increase in net worth was taxable income. In the case at bar, respondent's counsel allegedly stated that respondent had received from his father's estate "X dollars" according to one Government witness (R. 581), and the other Government witness stated that no figure was mentioned (R. 491). Clearly, such a casual admission by respondent's counsel did not constitute a "calculated fabrication" such as was made in the *Adonis* case.

Regardless of whether the cases are distinguishable on their facts, the evidence that the Government did introduce on the question of source is inadmissible. The Court below adopted two of the reasons advanced by respondent against

its admissibility, namely, the admissions were uncorroborated and that they were irrelevant. Consequently, there is not an iota of admissible evidence in the record as to source. This moved the Court below to say at page 33 of the Government's Petition Appendix as follows:

> "While we have mentioned the *Adonis* case, above, and the Second Circuit *Ford* case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established."

In short since the rules of evidence required the exclusion of the admissions, the Court below never reached the questions raised by the *Ford* and *Adonis* decisions.

II. THE COURT BELOW CORRECTLY APPLIED THE DECISION IN *Smith* v. *U. S.*, 348 U.S. 147 AND *U. S.* v. *Calderon*, 348 U.S. 160 IN RULING THAT RESPONDENT'S ADMISSIONS WERE NOT CORROBORATED.

In the *Smith* case, this Court held that corroboration may be one of two kinds.

(a) Independent evidence to bolster the admission itself.

(b) Independent evidence concerning the defendant's conduct during the prosecution years which tends to establish the crime as a whole.

As the Court below correctly noted, there was no evidence of actual graft taking or even opportunity for graft taking which could serve as corroboration of the admissions. The fact that the defendant was a police officer and on the vice squad in pre-indictment years is not corrobora-

tion of the admission. Further, the assets acquired by the respondent in the years prior to the indictment do not help the Government on this point as there was no evidence that he had not received gifts or inheritances in these pre-indictment years. Further, his salary as a municipal employee from 1921 through 1939 was tax exempt and he had in addition the general $2000.00 exemption afforded all taxpayers. On the other hand the living expenses of the respondent in 1946 as fixed by the Government was only $1313.40.

As to independent evidence tending to establish the crime as a whole, the Court below correctly ruled that "evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does not tend to prove from *where* the net worth increases likely issued." (Govt. Petition Appendix, p. 31)

III. The Ruling of the Court Below that the Admissions Were Inadmissible as Irrelevant Was Correct and Does Not Conflict with the Decision in *U. S.* v. *Ford*, 2nd Cir. 237 F.2d 57.

The Court below correctly stated the law as follows:

> "The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible." *Bracey* v. *United States*, 142 F.2d 85, 87 (D.C. Cir. 1944), cert. denied 322 U.S. 762 (1944).
>
> "In this connection it was stated in *Railton* v. *United States*, 127 F.2d 691, 693 (5 Cir. 1942):
>
> "' • • • It is logical to conclude, and very apt to be concluded, that because a man was dishonest once

> he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged. * * * ' " (Govt. Petition Appendix, p. 26)

Further, the Court held that these admissions were irrelevant due to the remoteness in time from the indictment years and due to the change in respondent's duties as a police officer. (Govt. Petition Appendix, p. 27)

In the *Ford* case, the defendant on appeal argued that it was possible that he received graft in pre-indictment years and so built up a cash hoard. The Court held that if it were assumed that the defendant actually profited through graft prior to the indictment years, since his duties on the vice squad did not change and there was proof of opportunities for graft in the indictment years, there existed a likely source of unreported taxable income.

In the case at bar, respondent at all times has strenuously denied the truth of the admissions. The admissions were made by respondent's attorney in a hypothetical and argumentative way while trying to convince Treasury officials that the case should be settled civilly. Respondent's attorney testified that he had no knowledge of his client's activities prior to the indictment years. Further, and most significant, the duties of the respondent in pre-indictment years was totally different than his duties as personnel officer and license board investigator which was his job during the years under indictment. In addition, most of the admissions pertain to prohibition days, which the Court below held being prior to 1943 was too remote in time from the indictment years.

IV. Other Meritorious Arguments Advanced by the Respondent Show the Decision Below To Be Correct Without Regard to the Questions Sought To Be Raised by the Petitioner.

As already noted on page 6 of respondent's Statement of the Case, the respondent raised several additional meritorious arguments which show that the decision of the Court below was correct. The Court below in its opinion adopted two of the arguments advanced, namely, that the admissions were uncorroborated and that they were irrelevant. As to the other arguments advanced, the respondent respectfully submits that they are equally meritorious and show clearly that the decision of the Court below was correct.

The important fact as regards the petition is that the Court below never reached the points of alleged conflict as set out in the Government's petition. The sole evidence of source introduced by the Government was the admissions. Without these admissions, the Government had no case. As an evidentiary matter, the admissions are inadmissible on several grounds. Two of the grounds, corroboration and relevance, are discussed and adopted by the Court below in its opinion. Either ground would be sufficient to exclude the admissions. In addition, the respondent argued other grounds for reversal of the conviction, mostly of an evidentiary nature. It is clear that this Court cannot reach whatever points of alleged conflict the Government seeks to raise in its petition. The Court below reversed the conviction on the grounds that the admissions were improperly admitted. This decision in no way conflicts with the decisions in the *Ford*, *Adonis*, *Smith* and *Calderon* cases. For the reasons advanced by the Court below in its opinion, and for the other reasons argued by respondent in his brief, the admissions should not have been admitted into evidence.

Conclusion

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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